83-445

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

THE OAKLAND RAIDERS, a limited partnership,
Petitioner,

vs.

THE CITY OF BERKELEY, a municipal corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
First Appellate District, Division Five

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QUESTION PRESENTED FOR REVIEW

The question presented by this petition is:

Whether the Court of Appeal of the State of California correctly concluded that the City of Berkeley's "Professional Sports Events License Tax" did not deprive the Oakland Raiders of the equal protection guarantees of the United States Constitution.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Other Authorities

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THE OAKLAND RAIDERS, a limited partnership,
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PETITION FOR A WRIT OF CERTIORARI to the Court of Appeal of the State of California, First Appellate District, Division Five

Petitioner, The Oakland Raiders, a limited partnership, prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division Five, as announced in the court's opinion filed June 3, 1983, a rehearing in connection with which was denied on June 23, 1983.

OPINION BELOW

The opinion of the Court of Appeal is reported at 143 CA 3d 636 and appears as Appendix A.

JURISDICTION

The judgment of the Court of Appeal was entered on June 3, 1983. A timely petition for rehearing was filed and the court's order denying rehearing was filed on June 23, 1983. The Court's order appears as Appendix B. There-

after, the Raiders' petition for hearing to the Supreme Court of the State of California was denied on July 27, 1983 and the order of the Supreme Court appears as Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The following constitutional provision is involved in the case at bar:

> "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

This case arises out of the enactment by the City Council of the City of Berkeley, on July 9, 1974, of the "Professional Sports Events License Tax" (Ordinance No. 4703-N.S.). That ordinance imposed a ten percent gross receipts tax on professional sports events held within the City of Berkeley. It is petitioner's contention that enforcement of said ordinance denies petitioner equal protection of the laws.

Petitioner (hereinafter referred to as Raiders) owns and operates the professional football team known as the Raiders. During the years 1972 and 1973 the Raiders' professional football games constituted the only major professional sports event held in the City of Berkeley. The games were held at the University of California Memorial Stadium and, in connection with each game held, the City of Berkeley was reimbursed by Raiders for police services provided.

As early as September 1973 respondent's City Council, by resolution, urged the University of California not to schedule further professional football games in Memorial Stadium.

In June 1974, respondent's City Council discussed the possible complete prohibition of professional football games in the City but was advised by the City Attorney that such a measure would be unconstitutional and a different approach would have to be taken.

Thereafter, effective July 9, 1974, the council amended the existing business license tax by adopting, as an urgency measure, ordinance 4703-NS, the Professional Sports Event License Tax. That ordinance imposed a 10% gross receipts tax on professional sporting events performed in the City of Berkeley, a rate 25 times that imposed on any other business in the City of Berkeley.

Subsequent to the enactment of the ordinance, the Raiders played four professional football games at the University of California Memorial Stadium in Berkeley. The games were played on August 10 and September 7, 1974 and August 10 and August 17, 1975.

On July 31, 1974 the Raiders commenced action number 452755-6 by filing its Complaint for Injunctive and Declaratory Relief by which it sought a permanent injunction against the enforcement of the tax and a declaration of its invalidity. The Complaint alleged *inter alia* unreasonable discrimination denying the Raiders equal protection of the laws in violation of § 1 of the Fourteenth Amendment. Following a hearing on the Raiders' application for a preliminary injunction, the court, on August 8, 1974, is-

sued a preliminary injunction precluding enforcement of the tax during the pendency of the action.

Discovery then ensued and, on June 5, 1975, the court granted Raiders' motion for summary judgment on the ground that, to the extent the tax sought to apply to professional football games to be performed at the University of California Memorial Stadium, it was an unlawful attempt to regulate the conduct of the Regents of the University.

The City of Berkeley appealed from that judgment, and, on November 29, 1976, the Court of Appeal of the State of California reversed the judgment of the trial court on the ground that the tax constituted a revenue rather than a regulatory measure. Thereafter, on February 1, 1977, the Court of Appeal's remittitur issued to the Superior Court.

Following the issuance of the remittitur, the City of Berkeley commenced action number 501020-8 and, by its First Amended Complaint, sought recovery of the tax allegedly due from the Raiders. The Raiders responded to the Complaint by filing its Answer in which it asserted, as an affirmative defense, the unconstitutionality of the tax.

Thereafter, on March 6, 1979, the two actions were consolidated and, on April 16, 1979, trial was held. On September 11, 1979, judgment was entered in favor of the City of Berkeley and against the Raiders in both actions and a timely appeal from that judgment was taken by Raiders, which appeal argued, *inter alia*, that the ordinance deprived the Raiders of equal protection of the laws.

The Court of Appeal's decision, in favor of the City of Berkeley, was subsequently filed on June 3, 1983; the

Raiders' Petition for Rehearing was denied on June 23, 1983, and a petition for hearing to the Supreme Court of the State of California was denied on July 27, 1983.

REASONS FOR GRANTING WRIT

THE PROFESSIONAL SPORTS EVENTS LICENSE TAX ENACTED BY THE CITY OF BERKELEY DEPRIVES THE RAIDERS OF ITS RIGHT TO EQUAL PROTECTION OF THE LAWS

In this case the California Court of Appeal concluded that enforcement of the Professional Sports Events License Tax enacted by the City of Berkeley does not deny Petitioner its right to equal protection of the laws. In so holding the court summarily concluded that:

> "Measured against existing precedents involving similar legislation', we conclude that the city can classify professional sporting events differently from other businesses, and can also exempt amateur or school-connected athletic events and impose a tax upon those that exist for profit. We hold that the tax in question is rationally based." (Appendix A, p. 5)

It is the Raiders' contention that the Court of Appeal erred in reaching the foregoing conclusion, particularly in light of the fact that the conclusion was reached without analysis of whether the classification had a fair and substantial relation to the object or purpose of the legislation; without comment on the evidence in the record, and with the citation of authorities which are neither dispositive nor persuasive. The court simply concluded that the tax is rationally based.

The Raiders recognize that legislative bodies have broad discretion in making classifications of persons or property

for the purpose of taxation, and that business taxes are presumed to be rationally based. Nevertheless, a business license tax must satisfy equal protection standards, and it is accepted that a classification contained in a license tax must be reasonable, based on substantial differences between the pursuits separately grouped, and not arbitrary. *Fox Bakersfield Theater Corp. v. City of Bakersfield,* 36 C. 2d 136, 142 (1950). The State must proceed upon a rational basis, and may not resort to a classification that is palpably arbitrary. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 527, 3 L. Ed. 2d 480, 485 (1958).

An analysis of whether there is a "rational basis" requires consideration of the objective or purpose of the ordinance. The rule often has been stated to be that the classification must rest upon some ground or difference having a fair and substantial relation to the object of the legislation. (See *Allied Stores of Ohio v. Bowers, supra,* p. 527, and cases cited therein). More particularly, the equal protection clause precludes legislation which results in different treatment of different classes of persons on the basis of criteria wholly unrelated to the objective of the statute. *Eisenstadt v. Baird,* 405 U.S. 438, 31 L. Ed. 2d 349 (1972). Rather, such a classification must rest on real and not feigned differences, and the distinction must have some relevance to the purpose for which the classification is made. *Walters v. St. Louis,* 347 U.S. 231, 237, 98 L. Ed. 660, 665 (1953).

In determining whether a classification is arbitrary or reasonably related to the inherent purpose of the law, the court must review the facts and circumstances surrounding the enactment, and the subject matter, in light of the presumption of the validity of the classification. *McLaughlin*

v. Florida, 379 U.S. 184, 13 L. Ed. 222, (1964). The court must conduct a serious and genuine judicial inquiry into the correspondence between the challenged classification and the legislative goal. *Talley v. Municipal Court,* 87 C.A. 3d 109 (1978).

It is the Raiders' contention that the City of Berkeley has failed, at every stage of these proceedings, to demonstrate any fair and substantial relationship of the classification scheme of this ordinance to its objective, and that the Raiders submitted adequate evidence to rebut any presumption of constitutional validity. A brief review of the evidence will demonstrate the merit of that contention.

As set forth in the Statement of the Case, *supra,* during the years 1972 and 1973 the Raiders' professional football games constituted the only major professional sports event held in the City of Berkeley. The games were held at the University of California Memorial Stadium and, in connection with each game held, the City of Berkeley was reimbursed by the Raiders for police services provided.

As early as September, 1973, Berkeley's City Council, by resolution, urged the University of California not to schedule further professional football games in Memorial Stadium. By June, 1974, the City Council discussed the possible complete prohibition of professional football games in the city but was advised by the City Attorney that such a measure would be unconstitutional and a different approach would have to be taken. Thereafter, effective July 9, 1974, the City Council enacted Ordinance 4703-NS and made the following findings:

> "This council finds and determines that public peace, health and safety are endangered by the holding of

> professional sports events in the City of Berkeley, and municipal traffic control, police, fire prevention, sanitary sewer and refuse collection services are materially and substantially increased by such events."

The ordinance imposed a tax at a rate of ten percent of gross receipts, a rate 25 times greater than that imposed on any other business taxed on a gross receipts basis in the City of Berkeley.

In addition, petitioner offered in evidence certain answers to interrogatories of officials of the City of Berkeley. The answers were to interrogatories framed in the form of the findings referred to above, which findings purportedly justified the enactment of the Professional Sports Events License Tax. Thus, interrogatory number 6 was:

> "Do you contend that the holding of professional sports events in the City of Berkeley materially and substantially increase municipal traffic control, police, fire prevention, sanitary sewer and refuse collection services provided by the City?"

Instead of providing the anticipated affirmative response to the interogatory, which may have suggested a potentially permissible objective, respondent's answer was "no" and it then sought to explain why it apparently did not contend its own findings were accurate.

Based upon its negative answer to interrogatory number 6, the City of Berkeley stated that interrogatory number 7, which asked for a calculation of the amount by which municipal services were increased as a result of the holding of professional sporting events, was not applicable.

Despite the foregoing showing by petitioner the City of Berkeley offered no evidence of the objective of the ordi-

nance. Thus, the City offered no evidence to show any purported burden created by the holding of professional sports events in the City of Berkeley, offered no evidence to show how 50,000 people attending a professional sports event created a greater burden than 50,000 people attending an amateur sports event, or for that matter, a professional rock concert; offered no evidence to show any cost analysis of the purported burden imposed upon the City by professional sports events; offered no evidence of any purported relationship between the exorbitant tax rate imposed and the cost of increased municipal services allegedly required by professional sports events; and offered no evidence to support the findings of the City Council in adopting the ordinance, even after appellant read into evidence the above quoted answers to interrogatories in which the findings were disavowed.

Petitioner urges the court that the state of the record as noted is more than sufficient to overcome any presumption of validity upon which the City of Berkeley might seek to rely. Moreover, this Court has held, in the context of a challenge to a denial of a license to a milk dealer on equal protection grounds, that the Court has ". . . no right to conjure up possible situations which might justify the discrimination." *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 274, 80 L. Ed. 675, 679 (1936).

This failure of the City of Berkeley to offer any evidence of the legislative objective or purpose of the ordinance distinguishes the instant case from frequently cited and otherwise similar cases involving equal protection challenges to tax statutes.

Thus, for example, in the case of *Gutknecht v. City of Sausalito*, 43 C.A. 2d 269 (1974) the California Court of Appeal upheld a tax on take-out food establishments in the face of an equal protection challenge but did so only after noting:

> "... The record contains extensive evidence indicating the take-out food businesses create a substantial litter burden upon the City. The revenue measure was intended to meet that burden, hence there is a reasonable relationship between the distinct class and the object of the legislation ... [43 C.A. 3d 279]
>
> '... In this case, we find nothing in the tax rate to refute the valid classification of take-out food establishments, particularly in light of the fact that the revenue produced was approximately equal to the calculated burden. Moreover, we find nothing in the record to support the contention that the tax rate is confiscatory or that the tax rate is merely a subterfuge for driving the Merchants out of the City.' [43 C.A. 3d 280]."

Nor are the cases cited by the Court of Appeal in support of its conclusion persuasive.

In *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974), a tax on private off-street parking lots in competition with municipally owned lots and residential lots was upheld, but that case was before the Supreme Court on certiorari following the invalidation of the ordinance by the Pennsylvania Supreme Court as an uncompensated taking of property contrary to the *Due Process Clause* of the Fourteenth Amendment. The Equal Protection Clause argument was disposed of by the Pennsylvania Supreme Court and was not addressed by the U.S. Supreme Court. Moreover, the Court addressed, in its due process analysis, the purpose

of the ordinance, and it noted that ". . ., the state court itself recognized that commercial parking lots are a proper subject for special taxation and that the city had decided, 'not without reason, that commercial parking operations should be singled out for taxation to raise revenue because of traffic related problems engendered by these operations'." *Pittsburgh v. Alco Parking Corp.*, supra, p. 375. Thus, at the level that the Equal Protection Clause was addressed, the Court appropriately considered the objective of the legislation.

Fox etc. Corp. v. City of Bakersfield, 36 C. 2d 136 (1950), upheld a higher tax on motion picture theaters than on other places of amusement or entertainment. It also held, however, that:

> "While the classification should be reasonable, natural and just, *in the absence of a showing to the contrary*, it will be assumed that there are good grounds for the classification, and the act will be upheld." (Emphasis added.) *Fox etc. Corp. v. City of Bakersfield*, supra at 142.

The Raiders submit that a "showing to the contrary" is reflected in the record, and that therefore the assumption of good grounds for the classification has been effectively questioned.

Hanson v. Town of Antioch, 18 C 2d 110 (1941) upheld a higher tax on merchants without a fixed place of business than on merchants with a fixed place of business within the city. The opinion relied primarily, however, on the rule established in *Sivertzen v. City of Menlo Park*, 17 C 2d 197 (1941), and that case commented extensively on the duty of the Court of Appeal:

> "Because of the familiarity of the local legislative bodies with such local problems, their ultimate deci-

> sions as expressed by the taxing ordinances should not be easily disturbed. It is the duty of this court only to guard against attempts on the part of such local authorities to create a tariff barrier in favor of local businesses. *If such attempt is shown by gross disparities, extraordinarily large exactions, or from other surrounding circumstances then, and only then, will such an ordinance be declared unconstitutional.* We do not find such elements present in the ordinance here being considered." *Supra*, p. 203. (Emphasis added.)

Petitioner submits that the recognition of this duty of analysis by the Court of Appeal distinguishes the cited case from the opinion of the Court of Appeal in the instant case.

People v. Keith Railway Equipment Co., 70 CA 2d 339 (1945), upheld the separate classification of privately owned railway cars, but the opinion also commented on the duty of the court (quoting from *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 510, 81 L.Ed. 1245, 1253):

> "In the nature of the case [a legislature] cannot record a complete catalogue of the considerations which move its members to enact laws. *In the absence of such a record* courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action." *People v. Keith Railway Equipment Co., supra*, p. 358. (Emphasis added.)

Petitioner respectfully submits, therefore, that the authority cited by the Court of Appeal in the instant case is not persuasive. The cases support the proposition that

the City of Berkeley is permitted to create separate classes for the purpose of imposing a business license tax, but they do not suggest that the court should consider that enactment of such legislation should result in a conclusive presumption of constitutional validity. In fact, each case contains language supporting petitioner's contention that the presumption of validity can be rebutted by evidence submitted at trial.

CONCLUSION

It is clear that the Professional Sports Events License Tax is not based upon natural distinctions inherent in the class of business taxed; nor are those purported distinctions reasonably related to the object of the legislation. Rather, the ordinance constitutes an arbitrary and discriminatory piece of legislation, the apparent sole purpose of which was to prohibit the performance of Raiders professional football in the City of Berkeley.

The California Court of Appeal has, for practical purposes, held that the presumption of validity which attaches to such classification is conclusive rather than rebuttable. In so doing, the court has held that even in the face of a showing that the ordinance was directed specifically at the taxpayer, exempted other businesses which could reasonably be expected to create similar demands on public services, and contained findings later contradicted by the taxing entity in answers to interrogatories, there was no necessity for any showing by the entity in support of the legislation. The effect of this decision of the Court of Appeal is to essentially preclude equal protection attack on any tax legislation, regardless of the egregiousness of

that legislation, and thereby to grant to the legislature virtual immunity from the equal protection guarantees of the Fourteenth Amendment.

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: September 14, 1983

Respectfully submitted,

RALPH A. LOMBARDI
Attorney for Petitioner

(Appendices follow)

Appendix A

In the Court of Appeal of the
State of California

First Appellate District

Division Five

AO11825

1 Civil 49775

Alameda County
Superior Court

No. 501020-8

City of Berkeley,
Plaintiff and Respondent,

v.

The Oakland Raiders,
Defendant and Appellant.

[Filed June 3, 1983]

This appeal presents the second half of the City of Berkeley versus The Oakland Raiders, wherein the Raiders continue to contest the city's professional sports events license tax. In *Oakland Raiders v. City of Berkeley* (1976) 65 Cal.App.3d 623 (*Raiders I*), this court reversed a summary judgment in favor of the Raiders and upheld the ordinance in question as (1) a valid revenue measure within the police power of the city rather than a regulatory scheme, and (2) a tax on the privilege of performing a business, rather than a tax upon the property of the Uni-

versity of California where the Raiders' professional football games were played. The case was then tried, resulting in a judgment for the city. In this appeal the Raiders contend that: (1) The trial court erred in rejecting their timely request for findings; (2) the tax cannot be applied to concession income paid to the Raiders by their licensed vendors at the games; (3) the tax cannot be applied to receipts from advance ticket sales prior to the enactment of the ordinance, although the games occurred thereafter; and (4) the tax violates the equal protection clause of the California Constitution, article I, section 11, and the United States Constitution, amendment XIV, section 1. We affirm the judgment.

The facts are undisputed. The city enacted a "Professional Sports Events License Tax" (Ordinance No. 4703-N.S.),[1] effective July 9, 1974, subjecting promoters of pro-

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[1]Ordinance No. 4703-N.S. provides:

"Section 1.2-26. PROFESSIONAL SPORTS EVENT.

"As used in this Ordinance, 'professional sports event' shall mean any sporting activity held at any place in the City of Berkeley wherein the participants are paid or compensated for their sporting services, whether in cash, securities, or otherwise and regardless of the amount of such services. Said definition shall not include athletes or students participating in athletic events wherein such athletes or students receive scholarships, grants-in-aid or similar financial support for educational purposes.

"Section 5.9. GROSS RECEIPTS TAX ON PROFESSIONAL SPORTS EVENTS.

"Every person commencing, transacting or carrying on any professional sports event in the City of Berkeley shall pay an annual license tax of ten percent (10%) of gross receipts measured as of the time or times such event or events as to which this tax is applicable may commence, be transacted or carried on in the City of Berkeley."

fessional sports events to an annual license tax of ten percent of the gross receipts derived therefrom. The Raiders subsequently played two games in the city in 1974, and two in 1975. Concessions were sold at all four games by third party vendors who paid the Raiders a percentage of all sales. With regard to the 1974 games, approximately 50,840 season tickets were sold prior to the effective date of the ordinance, and attendance at each of those games was less than 50,000.

FINDINGS OF FACT WERE NOT REQUIRED

Following receipt of the trial court's "Notice of Intended Decision," the Raiders timely requested findings of fact and conclusions of law which were denied on the grounds that "no disputed issues of fact" existed. We conclude that the trial court was correct and that no error occurred.[2] Findings are not required when the facts are admitted or established by stipulation. (*Taylor v. George* (1949) 34 Cal.2d 552, 556.) There is no dispute concerning the wording of the ordinance, its effective date, the date of the games, the number of pre-sold season tickets to the 1974 games, or the manner in which concession income was derived, and the parties stipulated to the amount of the gross receipts. The Raiders are contesting the constitutionality of the ordinance and its legal interpretation. Under these circum-

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[2]The trial occurred prior to the amendment of Code of Civil Procedure section 632 and rule 232 eliminating the necessity of findings of fact and conclusions of law and substituting in lieu thereof a statement of decision.

stances, no findings are required.[3] (See 4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 306, subd. (e).)

THE RAIDERS WERE NOT DENIED EQUAL PROTECTION

The Raiders argue that the tax deprives them of the equal protection guarantees of the state and federal constitutions because the city discriminated against professional sports events by levying the tax on them but not on amateur athletic events or other businesses. "[T]he power of [legislative bodies] to make classifications of persons or property for the purpose of taxation is very broad." (*Roth Drug, Inc. v. Johnson* (1936) 13 Cal.App.2d 720, 733.) Business taxes are presumed to be rationally based if any conceivable state of facts exists to support them. (*City of San Jose v. Donohue* (1975) 51 Cal.App.3d 40, 45; *Ladd v. State Bd. of Equalization* (1973) 31 Cal.App.3d 35, 38; see also *Pittsburgh v. Alco Parking Corp.* (1974) 417 U.S. 369.) Businesses, occupations and the entertainment industry may properly be subdivided and classified separately for license tax purposes. (*Tax Commissioners v. Jackson* (1930) 283 U.S. 527, 537; *Fox etc. Corp. v. City of Bakersfield* (1950) 36 Cal.2d 136, 142-143.) "No constitutional rights are violated if the burden of the license tax falls equally upon all members of a class, though other classes have lighter burdens or are wholly exempt, provided that

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[3]The city has adopted the Statement of Facts set forth in the Raiders' brief. The legal arguments advanced by the Raiders are all based on facts which the city accepts. The Raiders do not suggest what facts were in dispute, nor do they suggest any findings the trial court should have made.

the classification is reasonable, based on substantial differences between the pursuits separately grouped, and is not arbitrary." (*Fox etc. Corp., supra,* 36 Cal.2d at p. 142.) Measured against existing precedents involving similar legislation,[4] we conclude that the city can classify professional sporting events differently from other businesses, and can also exempt amateur or school-connected athletic events and impose a tax upon those that exist for profit. We hold that the tax in question is rationally based. The Raiders argue that the amount of the tax is unreasonable, but there is no requirement that the amount of the tax be reasonable—merely that it not be confiscatory nor prohibitory. (*Fox etc. Corp., supra* 36 Cal.2d at p. 139.) There is no evidence that this tax falls into those categories.

NO DENIAL OF DUE PROCESS

The argument that the taxation of gross receipts acquired prior to the enactment of the ordinance from advance ticket sales constitutes a deprivation of property without due process of law misconstrues the nature of the

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[4]As a partial example, see *Pittsburgh v. Alco Parking Corp.* (1974) 417 U.S. 369 (upholding a tax on private, off-street parking lots in competition with municipally owned lots and residential lots); *Fox etc. Corp. v. City of Bakersfield* (1950) 36 Cal.2d 136 (upholding a higher tax on motion picture theatres than on other places of amusement or entertainment); *Hansen v. Town of Antioch* (1941) 18 Cal.2d 110 (upholding a higher tax on itinerant peddlers than on businesses with a fixed place of business within the city); *Gutknecht v. City of Sausalito* (1974) 43 Cal.App.3d 269 (upholding a higher tax on "take-out food" restaurants than conventional restaurants); *People v. Keith Railway Equipment Co.* (1945) 70 Cal.App.2d 339 (upholding a higher tax on privately owned railway cars than those owned by railway companies).

tax and compares it to an income tax, which it is not. Rather, it is a license tax upon the privilege of conducting a business. (*Raiders I, supra,* 65 Cal.App.3d at p. 627; *Franklin v. Peterson* (1948) 87 Cal.App.2d 727, 733.) In this instance, the business taxed is the exhibition of professional football games occurring after the enactment of the ordinance. The gross receipts are merely the yardstick by which the license is measured. The Raiders were accorded due process. (See *Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 486, 493-496.)

CONCESSION INCOME IS INCLUDED IN GROSS RECEIPTS

Finally, the Raiders contend that funds received from vendors they licensed to provide food and drink for fans attending the ball games should not be included in their gross receipts. They cite no authorities to support this proposition. However, the ordinance defines gross receipts to include such income. Section 1.2-3 of the ordinance states, in pertinent part: " 'Gross receipts' means the total amount of the sale price of all sales and the total amount charged or received for the performance of any act, service, or employment of whatever nature it may be, for which a charge is made or credit allowed, whether or not such service, act, or employment is done as a part of or in connection with the sales of goods, wares or merchandise." Applying established rules of statutory construction (see *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 658-659), we agree

with the trial court that the ordinance encompasses such funds.

The judgment is affirmed.

HANING, J.

We concur:

LOW, P.J.

KING, J.

AO11825/1 Civil 49775

Appendix B

In the Court of Appeal of the
State of California
in and for the
First Appellate District

Division Five

No. AO11825

Alameda Superior Court No. 501020-8
City of Berkeley, etc.,
Plaintiff and Respondent,

vs.

The Oakland Raiders, etc.,
Defendant and Appellant.

[Filed June 23, 1983]

BY THE COURT:

The petition for rehearing is denied.

Dated: June 23, 1983

LOW, P.J.

Appendix C

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

July 27, 1983

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. 49775

The City of Berkeley

vs.

The Oakland Raiders

Respectfully,

Clerk

No. 83-445

In The

Supreme Court of the United States

October Term, 1983

THE OAKLAND RAIDERS, a limited partnership,

Petitioner,

vs.

THE CITY OF BERKELEY, a municipal corporation

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

to the Court of Appeal of the State of California,
First Appellate District, Division Five

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No. 83-445

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Supreme Court of the United States

October Term, 1983

THE OAKLAND RAIDERS, a limited partnership,

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vs.

THE CITY OF BERKELEY, a municipal corporation

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, City of Berkeley, a municipal corporation, answers the Petition for Certiorari on file in this action as follows:

OPINION BELOW

The opinion of the Court of Appeal is reported at 143 Cal. App. 3d 636, which appears as "Appendix A" to the Petition for Certiorari. A previous appellate decision in the case is *Oakland Raiders v. City of Berkeley*, 65 Cal. App. 3d 623 (1976).

STATUTES INVOLVED

Berkeley Ordinance No. 4703-N. S., July 9, 1974, amends Ordinance 2805-N. S. "Licensing For The Purposes Of Revenue Certain Professions, Business, Trades and Occupations in the City of Berkeley", by adding the following paragraphs:

Section 1.2-26. PROFESSIONAL SPORTS EVENTS.

"As used in this Ordinance, 'professional sports event' shall mean any sporting activity held at any place in the City of Berkeley wherein the participants are paid or compensated for their sporting services, whether in cash, securities, or otherwise and regardless of the amount of such services. Said definition shall not include athletes or students participating in athletic events wherein such athletes or students receive scholarships, grants-in-aid or similar financial support for educational purposes.

"Section 5.9. GROSS RECEIPTS TAX ON PROFESSIONAL SPORTS EVENTS.

"Every person commencing, transacting or carrying on any professional sports event in the City of Berkeley shall pay an annual license tax of ten percent (10%) of gross receipts measured as of the time or times such event or events as to which this tax is applicable may commence, be transacted or carried on in the City of Berkeley."

STATEMENT OF THE CASE

This case arises out of the enactment by the City Council of Berkeley of an amendment to the City's business license tax. The amendment, adopted on July 9, 1974, and entitled "Professional Sports Events License Tax" (Ordinance No. 4703-N. S.) imposed a ten percent gross receipts tax on professional sports events held within the City of Berkeley.

Petitioner owns and operates a professional football team known as the Oakland Raiders ("Raiders"). From 1972 through 1975, the Raiders played certain pre-season football games at the football stadium located on the campus of the University of California within the city limits of Berkeley. Each of these games was attended by almost 50,000 people.

On July 9, 1974, the Berkeley City Council amended the existing business license tax to impose a higher rate on professional sports events than on other businesses conducted in the City. Ordinance 4703-N. S., the Professional Sports Event License Tax.

Subsequent to the enactment of the ordinance, the Raiders played four football games at the University of California Memorial Stadium in Berkeley. The games were played on August 10 and September 7, 1974, and August 10 and August 17, 1975.

On September 11, 1979, the Alameda County Superior Court entered judgment in favor of the City and against the Oakland Raiders in the amount of $160,073.00 of unpaid business license taxes, plus costs.

Except as stated above, respondent joins in the procedural history of this litigation as set forth in the Statement of the Case in the Petition for Certiorari.

SUMMARY OF ARGUMENT

The California Court of Appeal correctly decided that an amendment to Berkeley's business license tax which taxes professional sports events does not deny equal protection. *City of Berkeley v. Oakland Raiders*, 143 Cal.

App. 3d 636 (1983). Although municipalities are subject to the Equal Protection Clause of the Fourteenth Amendment in the exercise of their taxing power, they are afforded great latitude in exercising that power for general revenue raising purposes. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). Berkeley's Ordinance, which taxes professional sports events while excluding amateur and student athletic events, does not constitute an invalid classification. To the contrary, such a distinction is entirely consistent with a well established tradition of taxing profit-making entities while excluding non-profit organizatios. See *Walz v. Tax Commissioner*, 397 U. S. 664 (1970).

Raiders also argue that the tax constitutes an invalid classification because it taxes sports events at a higher rate than rock concerts and other events, but have failed to introduce evidence that the tax was applied in a discriminatory fashion. It is well established that parties challenging tax measures under the equal protection clause must introduce explicit evidence to demonstrate that a classification is a hostile and oppressive discrimination against particular persons and classes. *Madden v. Kentucky*, 309 U. S. 83 (1940). Petitioner has failed to make such a showing.

Petitioner also argues that Berkeley failed to show a nexus between holding a professional sports event and the resulting burden on municipal services. There is no requirement, however, that taxes collected from a particular activity must relate to the value of services provided to the activity. *Commonwealth Edison Company v. Montana*, 453 U. S. 609, 622 (1981).

ARGUMENT

I. The Professional Sports Events Tax Does Not Deny Equal Protection.

This Court has consistently upheld legislative efforts to develop flexible and varied schemes of state taxation. Petitioner claims that the professional sports event tax denies equal protection but has failed to cite a single case in which a measure has been invalidated on equal protection grounds. In *Allied Stores of Ohio v. Bowers*, 358 U. S. 522 (1959), a case relied on by petitioner, the Court upheld an Ohio statute taxing inventories that residents stored in warehouses within the state and exempting the same products if stored by non-residents.

> "The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products . . .". *Id.* at 527.

In *Carmichael v. Southern Coal and Coke Company*, 301 U. S. 495 (1936), another case cited by petitioner, the Court upheld a state unemployment insurance law despite claims that it violated equal protection by exempting certain classes of employment, such as agricultural laborers, seamen, insurance agents, domestic servants, and by excluding employers who had less than eight employees. Rejecting plaintiff's argument, the Court held:

> "Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation." 301 U. S. at 509 (Citations omitted.)

The Court has reiterated the traditional standard in several more recent cases, all of which support the action

taken by the City of Berkeley in the instant case. *San Antonio School District v. Rodriguez*, 411 U.S. 1, (1973); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). The City has broad discretion to develop various taxing classifications. It has properly exercised that discretion by adopting a professional sports events tax.

II. The Oakland Raiders Fail To Present Any Basis For Invalidating The Tax.

A. The Tax Is Revenue Raising, Not Regulatory.

Petitioner makes several arguments in support of its contention that a tax on professional sports events denies equal protection. First, it argues that the tax was a regulatory measure intended to prevent the Raiders from playing football games in Berkeley. This is the same issue that was resolved adversely to the Raiders nine years ago. In Oakland Raiders v. City of Berkeley, 65 Cal. App. 3d 623 (1976), the California Court of Appeal held that the challenged tax was revenue raising, not regulatory, and was a valid exercise of the city's police power. In the previous appeal, the court limited its inquiry to the substantive provisions of the ordinance, and restated the well established principle that "the motives of the legislative body exercising the taxing power are beyond the inquiry of the courts". *Id.* at 628.

In its Petition for Certiorari the Oakland Raiders once again ask the Court to examine the City Council's motives in passing the tax, now arguing that such an inquiry would demonstrate that the petitioner was denied equal protection. This argument is unpersuasive for it

is well established that in equal protection analysis as well as other forms of statutory interpretation, the courts will not re-examine the motives of individual legislators. *Minnesota v. Clover Leaf Creamery Company*, 449 U. S. 456, 463 n. 7 (1981).

B. The Classifications Established By The Tax Are Valid.

Raiders argue that the classification between professional sports events, and amateur and student athletic events is invalid.[1] Petitioner fails to recognize that the sports events tax was passed as an amendment to the business license tax and is a revenue tax imposed on the privilege of doing business in the community. Professional sports events are business activities and the City can reasonably tax those events while exempting other sporting events. Indeed, taxing professional events while exempting amateur events is consistent with a well established practice of granting tax exemptions to educational and other non-profit entities.

> [The state] has granted [tax] exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The state has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, de-

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[1]Ordinance No. 4703-N.S. provides, in relevant part:

" 'Professional sports event' . . . shall not include athletes or students participating in athletic events wherein such athletes or students receive, scholarships, grants-in-aid or similar financial support for educational purposes."

> sirable, and in the public interest. . . . *Walz v. Tax Commissioner*, 397 U.S. 664, 673 (1970).

Although the classification which appears on the face of the ordinance is clearly valid, petitioner attempts to look beyond the ordinance and implies the existence of another classification which is not expressly stated. Raiders claim that the ordinance taxes professional sports at a higher rate than other spectator events and that the City has failed to demonstrate any differences between professional football games and other events such as rock concerts that might attract 50,000 spectators. Berkeley submits that the municipality's broad authority to develop classifications for taxing purposes permits the City to impose a higher tax on professional sports events than on rock concerts. *Lehnhauser v. Lake Shore Auto Parts Company, supra,* 410 U.S. 356. Equally important, petitioner failed to meet its burden of proof on this issue. It is well established that a litigant who challenges a tax on equal protection grounds must provide an "explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it." *Madden v. Kentucky,* 309 U.S. 83 (1940). In the instant case, petitioner did not introduce any evidence that rock concerts or other events attracting 50,000 people were held in Berkeley. Thus, Raiders' assertion that the sports events tax is invalid because it applies to the Raiders while exempting other events such as "50,000 people attending . . . a rock concert" is based solely on speculation (Raiders' Petition at 9). Without a specific factual showing that similar events were held

but were not taxed, the Raiders have no factual or legal basis upon which to challenge the tax.

C. The Tax Is Not Compensation For Municipal Services.

Raiders urge that Berkeley failed to demonstrate any relationship between the tax and the burden on municipal services caused by 50,000 people attending a football game. This argument finds no support in applicable law for it is clear that Berkeley was not required to make such a showing. In *Carmichael v. Southern Coal and Coke Company, supra,* 301 U.S. 495, the Court rejected the argument that an unemployment tax was invalid because those paying it may not have contributed to the unemployment.

> "There is no requirement that there be a nexus between the subject of the tax and the evil to be met by appropriation of the proceeds. . . . Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied." *Id.* at 521-522.

More recently, the Court upheld a state coal severance tax against similar claims. "[T]here is no requirement . . . that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of services provided to the activity." *Commonwealth Edison Company v. Montana,* 453 U.S. 609, 622 (1981).

These cases clearly indicate that the City was not required to introduce cost analyses relating the tax rate

to the burden on municipal services caused by the Raiders' football games.[2]

D. The Tax Rate Is Reasonable.

Raiders urge that the ten percent tax rate is "exorbitant" and implies that the tax rate further demonstrates that the ordinance violates equal protection. The City does not concede that the tax is exorbitant. Nevertheless, it is significant that this Court has upheld gross receipts taxes which are substantially higher than ten percent and has held that a tax may be valid even if sufficiently burdensome as to render a business unprofitable. *Pittsburgh v. Alco Parking Corporation*, 417 U.S. 369 (1974), upheld a twenty percent gross receipts tax imposed on private parking lot operators even though no tax was imposed on municipal parking lots. The coal severance tax upheld in *Commonwealth Edison* may be as high as thirty percent of the sales price, yet the Court gave short shrift to plaintiff's argument that the tax was excessive. The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial resolution. *Commonwealth Edison Company v. Montana, supra*, 453 U.S. at 627.

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[2]Although a factual showing is not required, the attendance of 50,000 spectators at an event obviously has substantial impacts on municipal services control. The large crowds create significant automotive and pedestrian congestion, particularly where, as in Berkeley, the sports facility is not located immediately adjacent to a freeway and has not been designed for transient automotive traffic. Such events also place a burden on police, fire prevention, emergency medical, sanitation and refuse collection services.

CONCLUSION

For the reasons stated above, the City of Berkeley respectfully requests that the petition for writ of certiorari be denied.

Dated: October 7, 1983

Respectfully submitted,

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